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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1958**

**No. 177**

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ALICE L. HEATH,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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It is somewhat surprising that the respondent should oppose petitioner's application, which is in support of the Treasury Department's own regulations of twelve years' standing.

Respondent's brief purports to quote the "Regulations Involved" (pp. 2, 3) but significantly omits the several extracts cited in the Petition (pp. 9, 10) which cover precisely the issue here presented, and show beyond dispute that the Regulations gave to the word "divorce" in the Statute the meaning of "decree of divorce," which was certainly one of the accepted meanings of the word in 1942, if not its preferred meaning. Curiously enough, respondent impliedly criticizes (footnote 2, p. 9) the omission from the Petition of another sentence from the Regulations

which employs the expression "incident to the divorce or separation"; he seems not to realize that this interchangeable use of "divorce" and "divorce decree" in the Regulations, with exactly the same meaning, is the strongest possible support for petitioner's contention that these words in the Statute must likewise be construed interchangeably. It would indeed be extraordinary if the Regulations were inconsistent several times within as many pages.

Respondent's own present *ad hoc* interpretation of the word "divorce" is far removed from the simplicity of his own long-established Regulations, for he asserts that the word is used in the Statute in the sense not merely of "status of divorce" but of "status of divorce *inter se*" (whatever that may mean). Footnote, page 10.

Respondent does not explain why the Tax Court's reversal of its former position in *Raoul Walsh*, 21 T. C. 1063, and disapproval of its own decision and that of the District of Columbia Court of Appeals in *Comm.* v. *Walsh*, 183 F. 2d 805, should militate against the granting of the Petition here. On the contrary, the following quotations from the Tax Court's opinion in *Raoul Walsh*, *supra*, seems clearly to justify certiorari:

> (p. 1070): "From considerable litigation involving the deductibility of alimony payments pursuant to written agreements not incorporated in divorce decrees, there have emerged two conflicting general views regarding a basic concept of sections 22(k) and 23(u). One view is exemplified by the language of the United States Court of Appeals for the District of Columbia Cir. in

*Miriam Cooper Walsh, supra*" (*Comm.* v. *Walsh, supra*), "as follows:

> Second, it is not disputed that there must be a decree of divorce or a decree of separation before this section of the statute has any application. It is also settled that 'divorce' as used in the phrase 'incident to such divorce or separation' means more than mere status. As was held in the *Cox* case, it refers to the actual dissolution of the marriage ties. Since such dissolution can be accomplished only under a decree, if Section 22 (k) is to apply, 'divorce' or 'separation' as used in the phrase 'incident to such divorce or separation must mean decree of divorce or decree of separation.'

"The second view, developed later, regards the statutes in question as indicating a 'congressional policy of placing the tax burden of all general marriage settlement payments on the party entitled to their enjoyment,' *Lerner* v. *Commissioner*, (C. A. 2, 152) 195 F. 2d 296, reversing 15 T. C. 379. * * * We think that the language of the statute and the purpose of Congress were to recognize a contractual obligation incident to the status of a divorce, as well as an obligation under a decree, by sections 22 (k) and 23 (u). Congress provided for deductions of periodic payments 'under such decree or under a written instrument incident to such a divorce.' The language following the word 'decree' alternatively indicates a second criterion, that of divorce status, as distinguished from the decree of divorce or decree of separation. This is supported by legislative intent and the weight of judicial opinion."

The Tax Court evidently agreed with the District of Columbia Court of Appeals, and disagreed with respondent's brief (p. 12) that *Comm.* v. *Cox* held squarely that the word "divorce" in the Statute meant "decree of divorce," not "status of divorce."

Respondent gives an inadvertently wrong impression in stating (p. 13) that "the decision of the Court of Appeals in the *Walsh* case" relied in part on the Tax Court determination in that case. Actually, the brief opinion of the Tax Court treated the case as cut-and-dried, merely citing its prior decisions in *Dauwalter*, 9 T. C. 580, and *Cox*, 10 T. C. 955. It made no reference to the Treasury Regulations, which bulked large in the much longer majority opinion of the Court of Appeals.

The *Raoul Walsh* opinion, like the courts below in the instant case and the respondent's brief, ignores completely the Treasury Regulations which explicitly removed any possible doubt as to the sense in which Congress used the word "divorce." The Tax Court, like the Second Circuit Court of Appeals, based its reversal of its previous decisions largely on what it assumed to be "legislative intent;" and by an odd coincidence its opinion was promulgated March 31, 1954, in the midst of a series of Congressional Committee hearings and reports which with the most crystal clarity explained the legislative intention as just opposite to what these learned tribunals had imagined it to be. See Petition, page 13.

Again in a footnote (p. 13), respondent attempts to minimize this clear expression of Congressional intent by characterizing it as "unexplained," and contrast-

ing it with a later sentence in the same report which used the statutory phrase "a written instrument incident to the divorce or separation." Here once more respondent seems surprisingly unaware that this is the best possible proof of petitioner's contention that in this phrase the word "divorce" has the usual meaning of "divorce decree." So understood, the Committee reports are consistent in themselves, and are also consistent with the Treasury Regulations. Respondent apparently would have us believe that the House Committee was so careless as to include two mutually inconsistent sentences on a basic point in the same report; further, that the summary of H. R. 8300 prepared for the use of the Senate Finance Committee by the technical staff of the Joint Committee on Internal Revenue Taxation, which was submitted at the opening of the Senate hearings on the bill on April 8, 1954 (Hearings before the Committee on Finance, United States Senate, 83rd Cong. 2d Sess. on H. R. 8300, pp. 1, 8), faced with the two inconsistent sentences in the House Report, adopted *sub silentio* the erroneous sentence as the correct one; and finally, that the Senate Finance Committee in its Report repeated the error of the House Committee, without explanation (Sen. Rep. No. 1622, 83rd Cong. 2d Sess. pp. 10, 170). Surely the notion of such a comedy of errors is too fantastic for serious consideration. Actually, the two Committees in the later sentence were merely quoting in indirect discourse the wording of the Statute, the meaning of which they had previously explained.

As to the absence of "explanation" in the Committee reports and hearings of the statement that the "written agreement" must be "incident to a decree,"

what further explanation was needed of the simple fact that the word "divorce" in the Statute was used in its usual acceptation as meaning "divorce decree?" If the statutory meaning was "status of divorce *inter se*," as contended by respondent, we would agree that a lengthy explanation would have been in order, but Congress intended no such complexity.

We respectfully submit that the writ should be granted.

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